87-1228

Supreme Court, U.S.
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Case No. _____

IN THE

Supreme Court of the United States

October Term 1987

PENNWALT CORPORATION,

Petitioner,

v.

DURAND-WAYLAND, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Arthur H. Seidel
Joel S. Goldhammer
Gregory J. Lavorgna
SEIDEL, GONDA, GOLDHAMMER
& ABBOTT, P.C.
1800 Two Penn Center Plaza
Philadelphia, PA 19102
Telephone: (215) 568-8383
Attorneys for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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QUESTION PRESENTED FOR REVIEW

This patent case dealing with the scope of infringement was decided by a seriously divided Court of Appeals for the Federal Circuit sitting in banc by its own motion. After the majority found no literal infringement, it went on to find no infringement under the doctrine of equivalents, reasoning that since a means for performing one function and its equivalent were missing from the accused device so as to preclude literal infringement, the accused device could not be equivalent to the claimed invention. The majority did not determine whether the accused device performed substantially the same function in substantially the same way to obtain the same result; i.e., it did not compare the accused device as a whole with the claimed invention as a whole. A substantial minority of the Court, including two of the three judges on the panel that heard the case, vigorously attacked the majority opinion as one that "contravenes Supreme Court precedents, which do not leave the majority free to rewrite the doctrine of equivalents without regard for stare decisis principles" and as not acknowledging "expressly the significant number of our prior decisions being overruled by its opinion."

The question presented for review is:

Does a finding that a patent claim is not literally infringed foreclose as a matter of law a finding of infringement under the doctrine of equivalents, or must the doctrine still be applied by comparing the accused device to the claimed invention as a whole?

Statement Under Rule 28.1

Petitioner Pennwalt Corporation has no parent companies or affiliates. Pennwalt Corporation has an interest in the following non-wholly-owned subsidiaries.

Decco-Roda, S.p.A.
P.O. Box 7
47032 Bertinoro (Forli) Italy

Industria Quimica Pennwalt, S.A.
Calle 18a, No. 50-55
Apartado Aereo 11711/4502
Bogota, D.E. Colombia

Japan Thiochemical Company, Ltd.
Daiichi-chuo Building
3-11, Nihonbashi 3-chome
Chuo-Ku
Tokyo 103, Japan

Lucidol Yoshitomi, Ltd.
35 Hiranomachi
Higashiku, 3 Chome
Osaka, Japan

Nitrogeno Industrial y Alimenticio, S.A.
Calzada Legaria No. 761
Mexico, D.F. 11500 Mexico

Pennfin, S.A. de C.V.
Apartado #1761
Mexico, D.F. 06000-1, Mexico

Pennwalt del Pacifico, S.A.
Apartado Postal 5-1130
Guadalajara, Jalisco, 45040,
Mexico

Pennwalt India Limited
507 Kakad Chambers, 5th Fl.
132 Dr. A. Besant Road
Worli, Bombay 400 018, India

Pennwalt, S.A. de C.V.
Apartado #1761
Mexico, D.F. 06000-1, Mexico

Petroquimica Pennwalt, S.A. de C.V.
Apartado #1761
Mexico, D.F. 06000-1, Mexico

Quimetal S.A.
Recursos Petroleros #11
Apartado Postal No. 72

Quimicas Pennwalt, S.A.
Apartado #1761
Mexico, D.F. 06000-1, Mexico

Servicios Corporativos Pennwalt, S.A.
Apartado #1761
Mexico, D.F. 06000-1, Mexico

Syrinx Innovations Ltd.
74 Great King Street
Edinburgh EH3 6QU,
Scotland

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in its cause Nos. 85-1882 and 85-1933 on November 6, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 833 F.2d 931, 4 U.S.P.Q.2d 1737, and is reprinted in the Appendix at page A1.

The opinion of the District Court is reported at 225 U.S.P.Q. 558, and is reprinted in the Appendix at page A90.

An unpublished supplemental Order of the District Court is reprinted in the Appendix at page A126.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on November 6, 1987, and the mandate issued November 27, 1987. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Article I, Section 8, Clause 8:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . .

Title 35, United States Code, §112, ¶6:

> An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

Title 35, United States Code, §271(a):

§271. **Infringement of patent**

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

STATEMENT OF THE CASE

Petitioner Pennwalt Corporation ("Pennwalt") filed this patent infringement action against Respondent Durand-Wayland, Inc. ("Durand-Wayland") in the United States District Court for the Northern District of Georgia. Pennwalt charged Durand-Wayland with infringement of U.S. Patent 4,106, 628 ("the '628 patent") on an invention for sorting articles by weight or a combination of weight and color.

The claimed invention is a high speed automatic machine for electronically sorting articles, such as fruit, on the basis of weight (claims 1 and 2) or on the basis of both weight and color (claims 10 and 18). An optical detector called a "color head" optically inspects articles to be sorted and generates an electronic signal representative of the color of an article. The article is conveyed from the color head over an electronic scale, where the article is weighed. The scale generates an electronic signal representative of the weight of the article. An electronic circuit responds to the weight signal (when sorting by weight alone) or to both the weight and color signals (when sorting by both weight and color) and generates grade signals representative of the weight grade or weight and color grades of the article. The article is then conveyed to a series of discharge locations, one location for each desired weight and color grade. The grade signals are electronically correlated with the position of the conveyed article relative to the discharge locations, and when the conveyed article is at the appropriate discharge location a discharge mechanism is electronically activated to discharge the article.

The embodiment of the invention disclosed in the '628 patent utilizes discrete electronic circuit elements, called "hard-wired logic", for responding to and processing the various signals.

The Durand-Wayland machines accused of infringing the patent also optically inspect articles to be sorted and generate an electronic signal representative of the color of an article. The article is then conveyed over an electronic scale, where the article is weighed. The scale generates an electronic signal representative of the weight of the article. A microprocessor responds to the weight signal or to both the weight and color signals and generates grade information in the form of data words representative of the weight grade or weight and color grades of the article. The article is then conveyed to a series of discharge locations, one location for each desired weight and color grade. The data words representing grade information are correlated in the microprocessor with the position of the conveyed article relative to the discharge locations, and when the conveyed article is at the appropriate discharge location a discharge mechanism is electronically activated to discharge the article.

Instead of "hard-wired logic", Durand-Wayland's machines use a microprocessor for responding to and processing the various signals. However, both the invention and the accused machines perform substantially the same function (sorting articles into one of several weight and color grades) in substantially the same way (by electronically sensing weight and color and processing the electronic weight and color signals to derive electronic signals representative of an article's weight and color grade) to obtain the same result (discharging articles at the appropriate discharge location based on weight and color grade).

The District Court found that "the machine described in the patent-in-suit and the [accused machine] are virtually identical *except* for the control system that conducts the sorting operation." 225 U.S.P.Q. at 569 (emphasis in original). However, the District Court found that the Durand-Wayland machines did not literally infringe the claims under 35 U.S.C. §112, ¶6, because the accused machines had no "position

—indicating means" for indicating the position of an article to be sorted, and because the details of how the weight and color signals were processed differed. The District Court then attempted to apply the doctrine of equivalents to the accused machines. Although it correctly stated the test for infringement under the doctrine of equivalents as set forth in *Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950), the District Court merely re-applied the analysis for literal infringement of "means for" claims under 35 U.S.C. §112, ¶6, and added the requirement that an "average artisan" in the sorting art recognize the interchangeability of microprocessors and hard-wired logic in order to support a finding of infringement, 225 U.S.P.Q. at 572 (A124):

> Inasmuch as the average artisan in the sorting industry would not have known of the interchangeability of the microprocessor(s) and its software with the electronic and logic circuitry disclosed in the patent-in-suit, the elements of the [accused machine] are not the legal equivalents of the components disclosed in the patent-in-suit.

A deeply divided[1] Federal Circuit, sitting in banc by its own motion, affirmed the District Court's finding of no infringement under the doctrine of equivalents. The decision of the Federal Circuit was based primarily on the lack of the "position indicating means" in the accused machines. The majority of the Federal Circuit paid lip service to the doctrine of equivalents, but went on to erroneously re-apply a literal infringement analysis, 833 F.2d at 939 (A15):

> No means in the accused devices performs that function [indicating position] and thus there could be no literal infringement. No means with an equivalent function was substituted in the accused devices and thus there can be no infringement under the doctrine of equivalents.

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1. The intensity of polarization of the Court of Appeals is reflected in the bitterness of the dissenting opinion, the Additional Views of Judge Nies, and the Commentary by Judge Newman, and the unusual denial by the majority, without comment, of Pennwalt's timely motion to stay the mandate pending the disposition of this petition.

Both the District Court and the majority of the Federal Circuit failed to analyze infringement under the doctrine of equivalents by comparing the accused machines as a whole to the claimed invention as a whole. By failing to do so, the Federal Circuit has eradicated long-established standards for equivalence and has made the doctrine of equivalents nothing more than a repetition of the test for literal infringement.

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The District Court's jurisdiction in this patent infringement action is based on 28 U.S.C. §§1331, 1332(a)(1) and 1338.

ARGUMENT

The Court of Appeals for the Federal Circuit has exclusive jurisdiction in patent cases. 28 U.S.C. §1295(a)(1). Its exclusive jurisdiction over patent cases makes it the ultimate judicial authority on substantive issues of patent law, except for this Court. Unless checked by this Court, the Federal Circuit is free to reshape the patent law at will, without regard to its own precedent or the precedents of this Court. The Federal Circuit has done precisely that in this case.

The virtually unrestrained authority of the Federal Circuit in substantive patent law underscores the necessity for this Court to review the important issue of patent infringement under the doctrine of equivalents.[2] The decision below is nothing less than a radical change in the doctrine of equivalents that nullifies this long-standing, vital doctrine of patent law.

The Decision Of The Court Of Appeals Effectively Abrogates The Doctrine of Equivalents

It has been a cardinal principle of patent law that a patent can be infringed not only literally but under the judicially-developed "doctrine of equivalents." Except for the relatively rare case of clear literal infringement, the doctrine of equivalents is considered in every case involving patent infringement.

The doctrine of equivalents is a long-established, vital part of patent law. It promotes the progress of science and technology by giving inventors a sense of security in their inventions. That the rights granted by a patent are a powerful stimulus to invention has long been recognized and, in the words of Abraham Lincoln, "The patent system added the fuel of interest to the fire of genius." The decision below quenches that fire.

The doctrine of equivalents was first expressed by this Court over 130 years ago in *Winans v. Denmead*, 56 U.S. (15 How.) 330 (1853). The classic modern formulation of the test for

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2. This Court last considered the question of infringement under the doctrine of equivalents thirty-eight years ago in *Graver Tank & Mfg. Co., Inc. v. Linde Air Products, Co.*, 339 U.S. 605 (1950).

infringement under the doctrine of equivalents was set forth in *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U.S. 605, 608 (1950):

> The theory on which [the doctrine of equivalents] is founded is that "if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape." [Citation omitted].

The doctrine of equivalents was developed to free a patentee from a "semantic strait jacket" of claim language in order to protect a patentee from an infringer who appropriates the invention but avoids the literal language of the patentee's claims. *Atlas Powder Co. v. E.I. du Pont de Nemours*, 750 F.2d 1569, 1579 (Fed. Cir. 1984); *Martin v. Barber*, 755 F.2d 1564, 1567 (Fed. Cir. 1985).

From its inception, the doctrine was recognized as an equitable remedy against wrongful appropriation of a patented invention, and was considered an adjunct of, not inimical to, a literal construction of patent claims. *Royal Typewriter Co. v. Remington Rand, Inc.*, 168 F.2d 691, 692 (2d Cir. 1948) (L. Hand, J.):

> [W]e are first to interpret the claims in the light of disclosure; and both the claims and the disclosure in the setting of the prior art. In these respects a patent is like any other legal instrument; but it is peculiar in this, that after all aids to interpretation have been exhausted, and the scope of the claims has been enlarged as far as the words can be stretched, on proper occasions courts make them cover more than their meaning will bear. If they applied the law with inexorable rigidity, they would never do this, but would remit the patentee to his remedy of re-issue, and that is exactly what they frequently do. Not always, however, for at times they resort to the "doctrine of equivalents" to temper unsparing logic and prevent an infringer from stealing the benefit of the invention. No doubt, this is, strictly speaking, an anomaly; but it is one which courts

> have frankly faced and accepted almost from the beginning. All patents are entitled to its benefit to an extent, measured on the one hand by their contribution to the art, and on the other by the degree to which it is necessary to depart from the meaning to reach a just result.

Until the decision below, the Federal Circuit has repeatedly recognized as law the doctrine of equivalents espoused in *Graver Tank*.[3] *Texas Instruments, Inc. v. U.S. Intern. Trade Com'n*, 805 F.2d 1558, 1571 (Fed. Cir. 1986); *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 1361 (Fed. Cir. 1983); *Great Northern Corp. v. Davis Core & Pad Co. Inc.*, 782 F.2d 159, 165-166 (Fed. Cir. 1986).

The Federal Circuit previously has also recognized that application of the doctrine of equivalents requires more than a strict element-by-element comparison of the accused device to the claims. Thus, the Federal Circuit has squarely held that the accused device as a whole must be compared to the claimed invention as a whole. *Hughes Aircraft, supra* at 1363; *Texas Instruments, supra* at 1571. Indeed, the Federal Circuit expressly held that failure to do so constitutes error. *Hughes Aircraft, supra* at 1364:

> The failure to apply the doctrine of equivalents to the claimed invention as a whole, and the accompanying demand for "obvious and exact" equivalents of two elements the presence of which would have effectively precluded literal infringement, was error.

By its present decision the Federal Circuit has effectively abrogated the doctrine of equivalents by making it no more than

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3. *Graver Tank* is one of the most often-cited opinions of this Court in patent cases, having been cited in nearly a thousand cases since the present patent statute took effect on January 1, 1953. The Federal Circuit, since its inception on October 1, 1982, has cited and applied *Graver Tank* and the doctrine of equivalents in at least thirty cases. Although the Federal Circuit has found both infringement and no infringement under the doctrine, it has never questioned the validity of the doctrine, nor has it criticized or modified *Graver Tank*. Moreover, each of the judges of the majority below have been on at least one panel which cited and recognized the authority of *Graver Tank*.

a repetition of the analysis for literal infringement under 35 U.S.C. §112, ¶6, precisely the approach it condemned as error in *Hughes Aircraft*. This is so, notwithstanding its token obeisance to *Graver Tank*, 833 F.2d at 935 (A7).

In the instant case, the Federal Circuit found that the absence of a single element from a patent claim precludes literal infringement, 833 F.2d at 934 (A 6-7). This has always been the law. However, it went on to hold that, because no claim element with a function equivalent to the function of the missing element was found in the accused devices, there could be no infringement under the doctrine of equivalents. *Id*. This was no more than a repeat of its analysis of literal infringement, an analysis defective because the Federal Circuit did not apply the doctrine of equivalents to the claimed invention as a whole.

The holding of the court below not only flies in the face of its own precedent, see *Hughes Aircraft*, 717 F.2d at 1363, it is diametrically at odds with the underlying rationale of *Graver Tank*. 339 U.S. at 607-609:

> One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.
>
> The doctrine of equivalents evolved in response to this experience. . . . "To temper unsparing logic and prevent an infringer from stealing the benefit of an invention" a patentee may invoke this doctrine to proceed against the producer of a device "if it performs substantially the same function in substantially the same way to obtain the same result." *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30,

> 42. The theory on which it is founded is that "if two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape." *Union-Paper Bag Machine Co. v. Murphy*, 97 U.S. 120, 125. The doctrine operates not only in favor of the patentee of a pioneer or primary invention, but also for the patentee of a secondary invention consisting of a combination of old ingredients which produce new and useful results, *Imhaeuser v. Buerk*, 101 U.S. 647, 655, although the area of equivalence may vary under the circumstances. See *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 414-415, and cases cited; see *Moore v. Osborn*, 11 Wall. 516, 556; *Gould v. Rees*, 15 Wall. 187, 192. . . .
>
> Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. [Footnote omitted].

The majority opinion rejects *Graver Tank* and makes equivalence the prisoner of a rigid formula by requiring obvious and exact equivalents for every element of a claim, i.e., it abrogates the "as a whole" analysis of the doctrine of equivalents implicit in *Graver Tank* and explicitly set forth in *Hughes Aircraft*. The decision reduces the doctrine of equivalents to nothing more than a re-application of the test of literal infringement.

Because the Federal Circuit sat in banc, the majority opinion effectively overrules, albeit *sub silentio*, its own precedent based on *Graver Tank*. Moreover, for all practical purposes, the majority opinion effectively expunges *Graver Tank* and its progeny.

Recognition of the majority's error is not limited to the vigorous dissent. The majority opinion has already been recognized as a "shockingly profound" change in and a "reinterpretation" of substantive patent law. As shown by Exhibit A, page 13 of this petition, the largest and most prestigious continuing legal education organization for the patent bar has roundly criticized the decision of the Federal Circuit as destroying the doctrine of equivalents:[4]

> The doctrine of equivalents has been virtually read out of patent law by an *en banc* holding (7-4) that for equivalence the accused device is to be compared to the claim, not as a whole, but on an element by element basis; and if a single element of the claim or function of such an element is missing from the accused device, there can be no *equivalence* (in short the standards for equivalence have become virtually the same as for literal infringement) *Pennwalt v. Durand-Wayland*. [emphasis in original].

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4. The quoted statement is from a circular of the Patent Resources Group of Washington D.C., which publishes numerous treatises and conducts numerous courses for the patent bar.

ADVANCED U.S. PATENT PRACTICE
CAFC CURRENT AWARENESS 1986-1988

* * *

COURSE FACULTY

Charles L. Gholz, Chairperson
Oblon, Fisher, Spivak,
McClelland & Maier
Arlington, Virginia
(former Technical Adviser to
Circuit Judge Rich)

Wayne W. Herrington
Office of the General Counsel
U.S. International Trade
Commission
Washington, D.C.
(former Technical Adviser to
Circuit Judge Rich)

Richard A. Killworth
Killworth, Gottman, Hagan
& Shaeff
Dayton, Ohio
(former Technical Adviser to
Judge Almond)

Basil J. Lewris
Finnegan, Henderson, Farabow,
Garrett & Dunner
Washington, D.C.
(former Technical Adviser to
Judge Lane)

COURSE DESCRIPTION

Shockingly profound changes in and reinterpretations of substantive patent law have come down from the U.S. Court of Appeals for the Federal Circuit during the past year.

The patent practitioner who has not followed CAFC cases exquisitely closely during 1986 and 1987 may now well be unsuspectingly practicing the wrong law. For example:

- The doctrine of equivalents has been virtually read out of patent law by an *en banc* holding (7-4) that for equivalence the accused device is to be compared to the claim, not as a whole, but on an element by element basis; and if a single element of the claim or a function of such an element is missing from the accused device, there can be no *equivalence* (in short the standards for equivalence have become virtually the same as for literal infringement) *Pennwalt v. Durand-Wayland*.

Conclusion

The Federal Circuit has radically changed the law of patent infringement. Unless this court acts favorably on this petition, the Federal Circuit by an in banc decision will have nullified long-established Supreme Court precedent, which due to the Federal Circuit's exclusive patent jurisdiction will be binding on every court in the United States but this one, and will extend far beyond patent infringement actions brought under the patent statute.[5]

The decision below engenders confusion between its formulation of the test for infringement under the doctrine of equivalents and the formulation in *Graver Tank*. The decision below forces one away from the broader analysis of *Graver Tank* into an element by element comparison and, in addition, blurs the line between literal infringement and infringement under the doctrine of equivalents. When analyzing an accused device for infringement, the two tests urge opposite results.

In what appears to be an attempt to provide a "bright line" test for patent infringement, the Federal Circuit has hemmed in patentees with an unnecessary restriction and has undercut the value of a patent as a vehicle for protecting inventions.

Unless this Court grants certiorari and reaffirms a broad reading of its decision in *Graver Tank*, the decision below will lead only to more confusion in future cases.

Respectfully submitted,

Arthur H. Seidel
Joel S. Goldhammer
Gregory J. Lavorgna
SEIDEL, GONDA, GOLDHAMMER
& ABBOTT, P.C.
1800 Two Penn Center Plaza
Philadelphia, PA 19102
Telephone: (215) 568-8383
Attorneys for Petitioner

5. For example, the scope of a licensed patent is among the most frequently litigated issues in patent license agreement disputes brought in state courts. The decision below will be just as binding in such cases as in cases under the patent statute, even though no appeal would lie to the Federal Circuit.